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No. 02-1608

In the Supreme Court of the United States

GREG RUGGIERO, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 632(a)(1)(B) of the Radio Broadcasting Preservation Act (RBPA), Pub. L. No. 106-553, 114 Stat. 2762, which requires the Federal Communications Commission to prohibit any person from obtaining a low power FM radio license if that person "has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934," is constitutional.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 3a-49a) is reported at 317 F.3d 239. The opinion of the panel of the court of appeals (Pet. App. 52a-75a) is reported at 278 F.3d 1323.

JURISDICTION

The judgment of the en banc court of appeals (Pet. App. 1a-2a) was entered on January 31, 2003. The petition for a writ of certiorari was filed on May 1, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal law has long prohibited persons from "us[ing] or operat[ing] any apparatus for the transmis-

sion of energy or communications or signals by radio" without a license from the Federal Communications Commission (FCC or Commission). 47 U.S.C. 301. Broadcast licenses may be granted only if the "public interest, convenience, and necessity will be served," 47 U.S.C. 309(a), and only upon applications that "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station," 47 U.S.C. 308(b).

Congress has vested the FCC with a broad array of powers to prevent persons from broadcasting without a license. The Commission may seek an injunction, 47 U.S.C. 401, issue a cease-and-desist order, 47 U.S.C. 312(b), or impose a monetary forfeiture, 47 U.S.C. 503(b). Any equipment used "with willful and knowing intent" to engage in unlicensed broadcasting "may be seized and forfeited to the United States." 47 U.S.C. 510(a). In addition, persons who willfully and knowingly violate the Communications Act of 1934 are subject to criminal penalties, including fines and imprisonment. 47 U.S.C. 501.

2. a. For many years, the FCC licensed a category of noncommercial educational radio stations, known as Class D stations, that were permitted to operate with a maximum of ten watts of power. Pet. App. 5a. Subsequently, in order to promote "the opportunity for other more efficient operations," the FCC halted the further licensing of such radio stations. *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, 69 F.C.C. 2d 240, 248-249, ¶¶ 23-24 (1978); see Pet. App. 5a. Thereafter, noncommercial educational FM radio stations were generally required to operate at a minimum power of 100 watts. 47 C.F.R. 73.511(a); see Pet. App. 5a.

In the ensuing years, a number of persons and entities began operating low-power FM (LPFM) radio stations without seeking or obtaining licenses. Pet. App. 5a. As a result, the FCC was forced to devote considerable resources to the enforcement of the Communications Act's basic broadcast licensing requirement against unlicensed LPFM broadcasters. *Ibid.*

b. In 1999, in response to petitions for rulemaking, the FCC proposed to modify its rules to create, *inter alia*, a class of LPFM radio service operating at 100 watts of power. See Notice of Proposed Rule Making, *Creation of a Low Power Radio Service*, 14 FCC Rcd 2471, ¶ 1 (1999) (Pet. App. 89a-98a). After considering comments, the FCC adopted rules authorizing the licensing of LPFM radio stations. Report and Order, *Creation of Low Power Radio Service*, 15 FCC Rcd 2205, 2206, ¶ 1 (2000) (Pet. App. 99a-111a).

Those rules disqualified all but a narrow class of unlicensed broadcasters from the new LPFM service. In particular, the rules prohibited unlicensed broadcasters from obtaining an LPFM license unless the applicant "certifie[d], under penalty of perjury, that: (1) it voluntarily ceased engaging in the unlicensed operation of any station no later than February 26, 1999, without specific direction to terminate by the FCC; or (2) it ceased engaging in the unlicensed operation of any facility within 24 hours of being advised by the Commission to do so." 15 FCC Rcd at 2226, ¶ 54 (Pet. App. 109a). The Commission explained that its treatment of unlicensed broadcasters reflected a "middle ground" approach between the position of "many commenters * * * that anyone who has operated illegally should not be eligible for a license" and the position of others who "argue[d] for amnesty

for unlicensed broadcasters." *Id.* at 2225-2226, ¶ 52 (Pet. App. 108a).

On reconsideration, the Commission clarified that, "in no event will an unlicensed broadcaster be eligible for an LPFM license if it continued illegally broadcasting after February 26, 1999." Memorandum Opinion and Order on Reconsideration, *Creation of Low Power Radio Service*, 15 FCC Rcd 19208, 19245, ¶ 95 (2000) (Pet. App. 113a-114a). The Commission also explained that its "rule on unlicensed broadcasters was based on our concern that past illegal broadcast operations reflect on the entity's proclivity to deal truthfully with the Commission and to comply with our rules and policies." 15 FCC Rcd at 19245, ¶ 96 (Pet. App. 114a). Any party ignoring a Commission order to cease unlicensed broadcasting, the Commission observed, "has demonstrated an unwillingness to comply with the Commission's rules and thus should not be rewarded with an LPFM license." *Ibid.*

c. The Commission's LPFM rules, including its decision to permit a narrow class of unlicensed broadcasters to remain eligible for LPFM licenses, engendered substantial opposition in Congress. Pet. App. 7a. Soon after the Commission adopted its first Report and Order, Senator Gregg introduced a bill to repeal the LPFM rules. *Ibid.* Among his objections were that the rules would "make[] formerly unlicensed, pirate radio operators eligible for LPFM licenses," which would "reinforce[] their unlawful behavior and encourage[] future illegal activity by opening the door to new unauthorized broadcasters." 146 Cong. Rec. S626 (daily ed. Feb. 10, 2000). In his view, the rules therefore "not only reward[] illegal activity, but * * * undermine the integrity of the radio spectrum." *Ibid.*

A House committee held a hearing on a similar proposal to repeal the LPFM rules. *FCC's Low Power FM: A Review of the FCC's Spectrum Management Responsibilities: Hearing on H.R. 3439 Before the Subcomm. on Telecomm., Trade, and Consumer Protection of House Comm. on Commerce*, 106th Cong., 2d Sess. (2000) (*House Hearing*). At that hearing, Representative Oxley stated that he "most object[ed] to the provisions making former unlicensed, pirate radio operators eligible for low power licenses," because that would "reinforc[e] their unlawful behavior and encourag[e] new unauthorized broadcasts in the future." *Id.* at 4. In reporting the bill, the committee concluded "that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public, and those individuals or groups should not be permitted to receive licenses in the LPFM service." H.R. Rep. No. 597, 106th Cong., 2d Sess. 8 (2000) (*House Report*); see 146 Cong. Rec. H2309 (daily ed. Apr. 13, 2000) (statement of Rep. Dickey) ("These individuals should not be rewarded for previous unlawful acts that interfered with authorized FM broadcasts.").

Congress's concerns with the initial LPFM rules resulted in enactment of the Radio Broadcasting Preservation Act of 2000 (RBPA or Act), Pub. L. No. 106-553, § 632, 114 Stat. 2762A-111, App. B (Pet. App. 76a-82a). Section 632(a)(1)(B) of the RBPA, the Act's character qualification provision, required the FCC to modify its LPFM rules to "prohibit any applicant from obtaining a low power FM license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934." Congress thus barred all

unlicensed broadcasters from obtaining an LPFM license regardless whether they have ceased unlawful operations. Pet. App. 8a.

The Commission modified its LPFM rules in accordance with this statutory directive. Second Report and Order, *Creation of a Low Power Radio Service*, 16 FCC Rcd 8026, 8030 (2001) (Pet. App. 83a). The Commission's rules now provide (47 C.F.R. 73.854) that "[n]o application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations, or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, 47 U.S.C. 301."

3. Petitioner Greg Ruggiero admits that he has engaged in unlicensed broadcasting. Pet. App. 8a; see *Free Speech ex rel. Greg Ruggiero* v. *Reno*, 200 F.3d 63 (2d Cir. 1999). He initiated this action by filing in the court of appeals a petition for review of the FCC's initial LPFM rules. After the completion of briefing and argument, Congress enacted the RBPA. The parties then filed supplemental briefs addressing the RBPA and its implementing rules.

a. A divided panel of the court of appeals found that the RBPA's disqualification of unlicensed broadcasters from LPFM service violates the First Amendment. Pet. App. 52a-75a. The panel majority ruled that the character qualification provision is (i) underinclusive in failing to apply to full-power broadcast licenses or to applicants that violated federal laws other than the license requirement and (ii) overinclusive in applying to applicants that have ceased violating the license

requirement and have exhibited an ability to comply with the governing laws. *Id.* at 67a-69a.

b. The en banc court of appeals vacated the panel opinion and upheld the constitutionality of the RBPA's prohibition against awarding LPFM licenses to unlicensed broadcasters. Pet. App. 3a-49a. Applying a standard that "occupies a ground somewhere between" rational basis review and intermediate scrutiny, *id.* at 10a, the court held that the Act's "character qualification provision is reasonably tailored to satisfying a substantial government interest," *id.* at 13a. The court found that there is a substantial government interest "in ensuring compliance with the Communications Act and in particular with its central requirement of a license to broadcast," *id.* at 14a, and that the character qualification provision is a "targeted response" and a "reasonable fit," *id.* at 18a. In the court's view, "that is surely enough to uphold a prohibition upon broadcast speech that * * * is in no respect content-based." *Id.* at 13a.

The court rejected petitioner's argument that the character qualification provision is impermissibly underinclusive in failing to disqualify applicants guilty of crimes more serious than broadcasting without a license. "Not only are murderers, rapists, child molesters, and the like not particularly associated with the harms caused by unlicensed broadcasting," the court observed, but "the harms that these malefactors do cause are not without other and more severe penalties (state or federal) than ineligibility for an LPFM license." Pet. App. 14a. The court explained that "[a]ll broadcast pirates, by definition, have violated already the requirement of obtaining a broadcast license," and that "Congress could reasonably conclude that other violations of law simply do not reflect as directly upon

the offender's qualification to hold an LPFM license." *Id.* at 15a. Because the RPBA's character qualification provision "targets those who have already violated the broadcast license requirement," the court reasoned, the statute is "reasonably tailored to further the Government's substantial interest in minimizing unlicensed LPFM broadcasting." *Id.* at 16a.

Moreover, the court rejected the suggestion that the character qualification provision is constitutionally suspect because it "disqualif[ies] LPFM pirates from holding an LPFM license, as compared with the consequences visited upon other unlicensed broadcasters and other offenders against the broadcast regulatory regime." Pet. App. 16a-17a n.*. The court explained that the "judgment that one offense is more serious than another * * * is not for the judiciary to make," and that the proper inquiry is "limited to whether the Congress has reasonably tailored the character qualification to fit the substantial government interest it is intended to serve," *i.e.*, limiting unlicensed LPFM broadcasting. *Ibid.*

Finally, the court rejected petitioner's contention that the character qualification provision is impermissibly overinclusive in applying to unlicensed broadcasters that have ceased their unlawful operations and become "model citizens." Pet. App. 16a. The court explained that "[a]ny unlicensed broadcasting demonstrates a willful disregard of the most basic rule of federal broadcasting regulation." *Ibid.* As a result, the court concluded, "Congress did not hit wide of the mark * * * when it treated all pirates alike." *Id.* at 17a.[1]

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[1] Judge Randolph issued a concurring opinion. Pet. App. 18a-24a. In his view, petitioner is barred from challenging the character qualification provision on overbreadth grounds because the

Judge Tatel dissented, reiterating the conclusion he had reached in his opinion for the panel majority that the character qualification provision is both underinclusive and overinclusive. Pet. App. 29a-49a.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. The court of appeals correctly upheld the constitutionality of the RBPA's prohibition against awarding LPFM licenses to unlicensed broadcasters. The FCC has long recognized that unlicensed broadcasting constitutes a serious violation of the Communications Act. As the Commission explained, "[u]nlicensed radio operators not only violate the longstanding statutory [and administrative] prohibition against unlicensed broadcasting," but "[i]llegal radio transmissions raise a particular concern because of the potential for harmful interference to authorized radio operations, including public safety communications and aircraft frequencies." 14 FCC Rcd at 2497, ¶ 65 (Pet. App. 96a). Accordingly, the Commission has used the full range of its authority to ensure that unlicensed broadcasters cease their

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provision entails no cognizable chilling effect on free expression. *Id.* at 19a-23a. Judge Randolph also rejected petitioner's underinclusiveness claim, reasoning that a law's alleged underinclusiveness raises no First Amendment issue in the absence of content-based discrimination. *Id.* at 23a-24a.

[2] Judge Tatel's dissenting opinion was not joined by any other member of the court. Judge Rogers, who initially had joined the panel majority opinion, now reached "a different result" and concurred in the en banc court's decision to uphold the constitutionality of the character qualification provision. Pet. App. 25a.

illegal operations. 14 FCC Rcd at 2497-2498, ¶ 66 (Pet. App. 96a-97a).[3]

In promulgating its initial LPFM character qualification rule, the FCC emphasized that it had "a critical need to ascertain whether a licensee will in the future be forthright in its dealings with the Commission and operate its station in a manner consistent with the requirements of the Communications Act and the Commission's rules and policies." 15 FCC Rcd at 2226, ¶ 53 (Pet. App. 109a). The Commission explained that "past illegal broadcast operations reflect on that entity's proclivity 'to deal truthfully with the Commission and to comply with our rules and policies,' and thus on its basic qualifications to hold a license." 15 FCC Rcd at 2226, ¶ 54 (Pet. App. 109a). The Commission had suggested, however, that "[t]he reliability as licensees of parties who may have illegally operated for a time but * * * ceased operation after being advised of an enforcement action" was "not necessarily as suspect." 14 FCC Rcd at 2498, ¶ 67 (Pet. App. 97a). The

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[3] See, *e.g.*, *Grid Radio* v. *FCC*, 278 F.3d 1314 (D.C. Cir.), cert. denied, 123 S. Ct. 82 (2002); *United States* v. *Szoka*, 260 F.3d 516 (6th Cir. 2001); *United States* v. *Neset*, 235 F.3d 415 (8th Cir. 2000), cert. denied, 534 U.S. 824 (2001); *La Voz Radio de la Communidad* v. *FCC*, 223 F.3d 313 (6th Cir. 2000); *United States* v. *Dunifer*, 219 F.3d 1004 (9th Cir. 2000); *United States* v. *Any & All Radio Station Transmission Equip.*, 218 F.3d 543 (6th Cir. 2000); *Prayze FM* v. *FCC*, 214 F.3d 245 (2d Cir. 2000); *United States* v. *Any & All Radio Station Transmission Equip.*, 207 F.3d 458 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001); *United States* v. *Any & All Radio Station Transmission Equip.*, 204 F.3d 658 (6th Cir. 2000); *Radio Luz* v. *FCC*, 88 F. Supp. 2d 372 (E.D. Pa. 1999), aff'd, 213 F.3d 629 (3d Cir. 2000) (Table). The Commission shut down 153 unlicensed radio stations in 1998, 154 such stations in 1999, and 25 such stations in the first two months of 2000. *House Hearing* 85.

Commission therefore decided not to disqualify unlicensed broadcasters from obtaining an LPFM license if, prior to February 26, 1999, they had ceased their unlawful operations "voluntarily" or "within 24 hours of being directed by the FCC to terminate unlicensed operation." 15 FCC Rcd at 19,263 (Pet. App. 116a).

Congress concluded that it was necessary to go further, and directed the Commission in the RPBA to prohibit *all* unlicensed broad casters from obtaining an LPFM license. Congress, like the FCC, was concerned "that the operation of an unlicensed station demonstrates a lack of commitment to follow the basic rules and regulations which are essential to having a broadcast service that serves the public." *House Report* 8. But Congress was also concerned that permitting any category of unlicensed broadcasters to remain eligible for LPFM licenses would undermine the integrity of the federal broadcast licensing system by encouraging unlawful behavior. See pp. 4-5 *supra*.

As the court of appeals correctly found, Congress's conclusion that all unlicensed broadcasters should be disqualified from eligibility for an LPFM license was reasonable and fully constitutional. There is a substantial governmental interest in promoting compliance with the Communications Act's basic licensing requirement, Pet. App. 13a-14a, and the RPBA constitutes a valid and "targeted response to the problem of pirate broadcasting," affecting "only those who violated the license requirement, and [doing] so utterly without regard to the content of, or any view expressed by, their unlicensed broadcasts," *id.* at 18a. The bar against awarding an LPFM license to unlicensed broadcasters encourages compliance with the licensing requirement and prohibits those with a history of disregarding

broadcast laws from obtaining a license to conduct LPFM operations. See *id.* at 15a (What "could be more reasonable or logical than to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future and therefore to head them off?") (internal quotation marks omitted).

2. Petitioner renews his contention (Pet. 15-25) that the RPBA's character qualification provision violates the First Amendment. That claim lacks merit.

a. As a threshold matter, petitioner submits (Pet. 16-17) that the court of appeals should have applied "intermediate scrutiny" in evaluating the character qualification provision but that the court instead, "in effect, applied minimal scrutiny." That is incorrect.

The court of appeals specifically declined to apply "minimal scrutiny" and instead applied a form of heightened scrutiny, assessing whether the character qualification provision "is reasonably tailored to satisfying a substantial government interest." Pet. App. 12a-13a. The court characterized that standard as "occup[ying] a ground somewhere between" rational basis review and intermediate scrutiny. *Id.* at 10a. The court's approach was grounded in the recognition that this Court has generally applied "a less rigorous standard of First Amendment scrutiny to broadcast regulation," *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 637 (1994); see *Red Lion Broad. Co.* v. *FCC*, 395 U.S. 367, 388-399 (1969), and that intermediate scrutiny applies to broadcast regulations only when the restriction on speech is content-based. Pet. App. 10a-11a; see, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984).

Petitioner does not challenge the court of appeals' conclusion that the RBPA's prohibition against awarding an LPFM license to unlicensed broadcasters "is

triggered solely by the applicant's conduct" and "applies without regard to any content the applicant may have broadcast unlawfully or might be expected to broadcast if a license were issued to him." Pet. App. 11a. Accordingly, petitioner errs in relying (Pet. 20) on decisions in which this Court has invalidated content-based broadcast regulations under intermediate scrutiny. See *League of Women Voters*, 468 U.S. at 388-399; see also *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 188 (1999).

In any event, petitioner's abstract disagreement with the court of appeals' characterization of the applicable constitutional standard does not warrant review. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (internal quotation marks omitted). Intermediate scrutiny requires the government to demonstrate a substantial interest in the challenged provision, see, *e.g.*, *Turner Broad.*, 512 U.S. at 662, and petitioner does not dispute the court of appeals' conclusion that the government "no doubt" has a substantial interest in promoting compliance with the Communications Act's licensing requirement, Pet. App. 14a. Moreover, while intermediate scrutiny requires "narrow tailoring," that requirement only calls for a "reasonable" fit and not does not demand "employ[ing] the least restrictive means conceivable." *Greater New Orleans Broad.*, 527 U.S. at 188; see *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 429 (1993); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798-800 (1989). In this case, the court of appeals found that "[t]here is a reasonable fit between the character qualification and the Government's substantial interests." Pet. App. 18a.

b. Petitioner errs in arguing that the RBPA is impermissibly underinclusive and overinclusive. Peti-

tioner contends (Pet. 21) that the failure of Congress to include "civil wrongdoers, felons" and the like within the scope of the RBPA's ban undermines the validity of the government's rationale. As the court of appeals explained (Pet App. 14a), however, there was no evidence of a pressing problem concerning those categories of persons seeking to apply for LPFM licenses. Moreover, persons not covered by the RBPA's bar are subject to the FCC's general character qualification policy, under which they may be disqualified from obtaining a license in any event. *Id.* at 15a; see *Contemporary Media, Inc.* v. *FCC*, 214 F.3d 187, 193 (D.C. Cir. 2000) (upholding revocation of station license held by company whose president and sole shareholder had been convicted of felony child abuse).

Petitioner argues (Pet. 19) that application of the FCC's "traditional character qualification policies" to the new low power licensing scheme would have been sufficient to achieve "regulatory compliance." In the view of the FCC and Congress, however, a character qualification provision specific to the LPFM regulatory scheme was desirable because of the particular long-standing and persistent problem of unlawful low power broadcasts. As the extensive litigation and administrative history of the issue had shown, the problem of unlicensed broadcasting had been directly associated with the low-power movement. See, *e.g.*, *Grid Radio*, 278 F.3d at 1317; *House Hearing* 28-29 (prepared statement of E.O. Fritts and B.T. Reese) ("[T]he fact is that the LPFM movement does have roots in pirate broadcasting."). Nothing in the Constitution compels a court to impose petitioner's suggested regulatory policy over the judgment of Congress and the expert administrative agency. See *Ward*, 491 U.S. at 800.

Finally, the court of appeals correctly refused to second-guess Congress's judgment concerning the need for a blanket prohibition against awarding LPFM licenses to unlicensed broadcasters. See Pet. App. 15a-16a & n.*. As the court explained, "[a]ny unlicensed broadcasting demonstrates a willful disregard of the most basic rule of federal broadcasting regulation." *Id.* at 16a. In Congress's view, even if a particular unlicensed broadcaster could demonstrate a renewed commitment to adhering to the applicable rules, the possibility that a category of unlicensed broadcasters would remain eligible for LPFM licenses would encourage the belief among others that no lasting consequences would ensue from noncompliance with—indeed, outright defiance of—fundamental regulatory requirements. The RBPA promotes an understanding that failure to abide by the Communications Act's basic licensing requirement carries serious consequences. Because the RBPA's disqualification provision directly advances the government's interest in ensuring the compliance integrity of the federal system of broadcast regulation, its disqualification of unlicensed broadcasters is fully constitutional.[4]

[4] Petitioner also renews his contention (Pet. 26) that the character qualification provision violates the equal protection component of the Fifth Amendment's Due Process Clause. As the court of appeals correctly explained (Pet. App. 17a-18a), that claim is subject to the same analysis as petitioner's First Amendment claim and fails for the same reasons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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